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No. 03-583

In the Supreme Court of the United States

Josue Leocal,

Petitioner

v.

John D. Ashcroft, in his capacity as United States Attorney General, and the Immigration and Naturalization Service,

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF THE MIDWEST IMMIGRANT & HUMAN RIGHTS CENTER AS AMICUS CURIAE IN IN SUPPORT OF PETITIONER

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Brief of the Midwest Immigrant & Human Rights Center as Amicus Curiae in Support of Petitioner

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With the consent of the parties, *amicus curiae* **Midwest Immigrant & Human Rights Center** ("MIHRC") respectfully submits this brief in support of the Petitioner, Josue Leocal.*

B. INTEREST OF *AMICUS CURIAE*

The Midwest Immigrant and Human Rights Center (MIHRC), a program of Heartland Alliance for Human Needs and Human Rights, provides direct legal services to and advocates for impoverished immigrants, refugees, and asylum seekers. MIHRC, formerly known as Travelers and Immigrants Aid, has worked with and represented low-income immigrants since 1881, including immigrants like Mr. Leocal, who are in deportation proceedings by the United States Bureau of Immigration and Customs Enforcement (formerly the Immigration and Naturalization Service) due to past criminal conduct. MIHRC conducts legal rights presentations and individual legal consultations in various county jails throughout Illinois, Indiana, and Wisconsin, and litigates on behalf of immigrants in immigration courts and the federal courts, often in conjunction with local lawyers working *pro bono publico*. Through direct legal services and advocacy, MIHRC strives to advance local and

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* Counsel of record for the parties do not object to the filing of this brief. In accordance with this Court's Rule 37.2(a), those letters have been filed with the Clerk.

In accordance with Rule 37.6, *amicus* states that this brief was authored in its entirety by the counsel listed on the cover, and no person or entity other than the *amicus* listed on the cover made a monetary contribution to the preparation or submission of this brief.

international human rights and protections for immigrants, refugees and asylum seekers, including the right to be free from arbitrary or unreasonable detention.

C. SUMMARY OF THE ARGUMENT

Question(s) presented: Whether, in the absence of a mens rea of at least recklessness with respect to the active application of force against another, DUI with serious bodily injury is a "crime of violence" under 18 U.S.C. § 16 that constitutes an "aggravated felony" under § 101 of the INA ?

In essence, driving under the influence ("DUI") is not a deportable offense because it is not a crime of violence. The legislation and the legislative history, from the enactment of section 16 in 1984 to the present, manifest a clear and unequivocal Congressional intent to not have DUI be classified as a section 16 crime of violence. In passing section 16, Congress modeled the crimes of violence after the DC Court Reform Act, which categorized crimes of violence to include crimes such as murder, mayhem, forcible rape, but did not include DUI. In the litany of amendments to the immigration laws, Congress never saw fit to include DUI into any part of the statute, except one. The only portion of the immigration law to reference DUI is 8 U.S.C. §1101(h), which shows that Congress considers DUI as a serious criminal offence, but not a crime of violence. Even later amendments never included DUI as a crime of violence. But-for section 1101(h), the immigration laws are silent on this point. Against, this inchoate backdrop, Congress never understood that DUI would be a crime of violence under section 16 and hence a deportable offense.

Statutes At Issue

Section 16	18 U.S.C. §16

Section 1101	8 U.S.C. §1101
Section (h)	8 U.S.C. §1101(h)
Section 43(F)	8 U.S.C. §1101(a)(43)(F)

D. ARGUMENT

The analytical construct for determining whether driving under the influence ("DUI") is a deportable offense is as follows. If DUI is a crime of violence under 18 U.S.C. §16, then it is a crime of violence and an aggravated felony under 8 U.S.C. § 1101(a)(43)(F). If it is a crime of violence under (43)(F), then it becomes an aggravated felony and a deportable offense under 8 U.S.C. §1227(a)(2)(A)(iii). The question, therefore, is whether DUI qualifies as a crime of violence under 18 U.S.C. §16, for if it does not, then the entire analytical construct collapses. Fortunately for Mr. Leocal, whether DUI qualifies as a section 16 crime is a question of law and thus this Court need not defer to the lower courts' determinations. To the extent there is some dispute over the construction of this section, any doubt must be resolved in favor of Mr. Leocal, as deportation is a drastic measure. *I.N.S. v. Errico*, 385 U.S. 214, 225 (1966).

This Court cannot narrowly view the issue as being whether section 16, divorced from the context of immigration law, includes DUI as a crime of violence. The certified Question includes the context of immigration law removability, and hence requires an examination of section 16 in conjunction with the immigration removal laws. For this reason, *Amicus* also analyzes the relevant immigration laws to demonstrate that Congress did not intend that DUI be classified as an aggravated felony and hence a deportable offense.

(i) Congress specifically enumerated various felonies but did not intend to include DUI as a crime of violence

The plain language of the statute is the starting point for statutory analysis. *Watt v. State of Alaska*, 451 U.S. 259, 265 (1981). The Court may also look to "the statute's language, structure, subject matter, context, and history – factors that typically help courts determine a statute's objectives and thereby illuminate its text." *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998). The "title of a statute and the heading of a section are 'tools available for the resolution of doubt' about the meaning of a statute." *Almendarez-Torres*, 523 U.S. at 234. Nowhere in any relevant section is an aggravated felony defined to include DUI. The inclusion of DUI is a judicial creation. That is, when Congress chose to define "aggravated felony" in section 43(F), it did not include DUI and Congress' treatment of DUI in relation to the immigration laws shows that it did not intend that DUI be a crime of violence or an aggravated felony.

Congress coined the term, "crime of violence" in 1970, when it denominated a category of crimes for which detention without bail was authorized. Dist. of Columbia Court Reform and Procedural Act of 1970, Pub. L. No. 91-358, 84 Stat. 473 (1970)("DC Court Reform Act"). It listed various crimes but certainly did not include DUI as a listed offense.

To that end, the text of the DC Court Reform Act created two categories of crimes, in section 201, which could justify preventive detention. The first, "dangerous crime", was defined as:

> (A) taking or attempting to take property from another by force or threat of force, (B) unlawfully entering or attempting to enter any premises adapted for overnight accommodation of persons or for carrying on business with the intent

> to commit an offense therein, (C) arson or attempted arson of any premises adaptable for overnight accommodation of persons or for carrying on business, (D) forcible rape, or assault with intent to commit forcible rape, or (E) unlawful sale or distribution of a narcotic or depressant or stimulant drug . . . if the offense is punishable by imprisonment for more than one year.

"Crime of violence" was a sister category, the second of the two types of crime that would potentially justify preventive detention. It was defined as follows:

> [T]he term "crime of violence" means murder, forcible rape, carnal knowledge of a female under the age sixteen, taking or attempting to take immoral, improper, or indecent liberties with a child under the age of sixteen years, mayhem, kidnapping, robbery, burglary, voluntary manslaughter, extortion or blackmail accompanied by threats of violence, arson, assault with intent to commit any offense, or an attempt or conspiracy to commit any of the foregoing offenses . . . if the offense is punishable by imprisonment for more than one year.

Perhaps this is why that, in defense of the DC Act, the Nixon administration testified that concluding that DUI was dangerous to the community at large would be simply unreasonable:

> [A] court could say that . . . a petty offense was dangerous to the community, the guy was a drunk driver for example, and this was dangerous to the community. Such a conclusion, however, would be simply unreasonable . . . . Testimony of Donald Santarelli, Ass. Dep. Atty. Gen., "Preventative Detention: Hearings Before the

Subcomm. on Constitutional Rights," Senate Comm. on the Judiciary, 91st Cong. 314 (1970).

Similar arguments were made regarding the DC Act by other members of the Nixon administration. The Attorney General, for example, published a law review article stating that detention without bail under the proposed Act would only be imposed for offenses that were punishable by death at the time of the American Revolution. J. Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 Va. L.R. 1223 (1969).

Other testimony before the Subcommittee on Constitutional Rights referenced the Attorney General's article. Finally, as Crawford and Hutchins note, studies tracking serious crime in the District of Columbia, studies which the Administration relied on to justify preventive detention, did not examine occurrences of DUI. Crawford & Hutchins, *Ignoring Congress: The Board Of Immigration Appeals and Crimes of Violence in Puente and Magallanes*, 6 Bender's Immig. Bull. 67 (2001).

Congress first passed 18 U.S.C. §16 in 1984 as part of the Comprehensive Crime and Control Act of 1984 and *has never amended* it in any regard, much less amend it to define a crime of violence to include DUI. Whilst Congress has never muddled with section 16, it has, as we shall soon see, muddled extensively with the immigration laws to expressly enumerate various deportable crimes and in one instance define a particular crime to include DUI.

The legislative history of section 16 shows that Congress modeled it after the D.C. Court Reform Act. The Senate Report indicates that Congress meant that a crime of violence under §16 to include the same type of offenses as in the DC Court Reform Act's definition of a crime of violence. As noted above, "crimes of violence"

under the Act means murder, forcible rape, carnal knowledge of a female under the age of sixteen, taking or attempting to take immoral, improper, or indecent liberties with a child under the age of sixteen years, mayhem, kidnapping, robbery, burglary, voluntary manslaughter, extortion or blackmail accompanied by threats of violence, arson, assault with intent to commit any offense, assault with a dangerous weapon, or an attempt or conspiracy to commit any of the foregoing offenses. 1984 U.S.C.C.A.N. 3182, 3203-04 ("These offenses are essentially the same categories of offenses described in the District of Columbia Code by the terms "dangerous crime" and "crime of violence" for which a detention hearing may be held under that statute."); *see also*, Crawford & Hutchins, *Ignoring Congress: The Board Of Immigration Appeals and Crimes of Violence in Puente and Magallanes*, 6 Bender's Immig. Bull. 67 (2001); M. Salemi, Comment, *DUI as a Crime of Violence Under 18 U.S.C. § 16(b): Does a Drunk Driver Risk Using Force?* 33 Loy. U. Chi. L. J. 691 (Spring 2002). As such, the phrase "crime of violence" was intended to include the same types of offenses as the DC Court Reform Act's definitions of crimes of violence.

Common sense shows how DUI is not even in the same realm of heinousness as the above crimes. For example, it would strain credulity to import DUI into the DC code so that it reads like, "murder, forcible rape, carnal knowledge of a female under the age of sixteen, taking or attempting to take immoral, improper, or indecent liberties with a child under the age of sixteen years, mayhem, kidnapping, robbery, burglary, voluntary manslaughter, *DUI*, ..." At a glance, DUI's placement in the list is at best, odd. Common sense militates otherwise. *BedRoc Ltd., LLC v. U.S.*, 124 S.Ct. 1587, 1596 (2004)(Thomas and Breyer, JJ, concurring in judgment)("As the plurality points out, both common sense and the 'statutory context' of the Pittman Act's enactment confirm the view that sand and gravel are not

included within the Pittman Act's mineral reservations, since sand and gravel were not understood to be 'valuable minerals' at the time of the passage of the Act.").

Congress then passed the 1988 Anti-Drug Abuse Act (ADAA), 102 Stat. 4181 (now 8 U.S.C. § 1101(a)(43)), which included the term "aggravated felony" in relation to the Immigration Act. The ADAA definition of an aggravated felony only included the most serious crimes such as murder and drug trafficking. It did not list DUI offenses in that definition. Where Congress, in promulgating the statute, chose to specifically enumerate certain felonies and omitted others, Congress did not intend that the omitted felonies be passively included within the statute's construction.

(ii) If DUI is already a crime of violence under §1101(h)(2), then it renders the express definition of DUI under §1101(h)(3) superfluous.

Perhaps the death knell to the Government's position that DUI is an offense under section 16 or section 43(F) is that Congress chose to define a "serious criminal offense" in section 1101(h) to include DUI. In 1990, it passed Pub. L. No. 101-246, which specifically defined that a "serious criminal offense" includes "any crime of reckless driving or of driving while intoxicated or under the influence of alcohol or of prohibited substances if such crime involves personal injury to another." §1101(h)(3).[1]

[1] When Congress enacted section 1101(h), it simultaneously added paragraph (34) to section 1182(a) of the Immigration and Nationality Act, which defines classes of aliens who are ineligible for visas and or *admission* into the United States. Pub. L. No. 101-246. Under section 1182(a)(34), diplomats who have left the country after committing a "serious criminal offense" as defined under the newly created section 1101(h) can be permanently excluded from the United States. Thus, Congress enacted section 1101(h), in part, to deal with the problem of diplomats who endanger public safety by driving a vehicle under the influence of alcohol. Notably, Congress did not provide a basis for *deporting* the diplomat for such conduct. Notably, section 1101(h) was part of a bill entitled, "Foreign Relations Authorization Act" and was particularly in a section entitled, "Diplomatic Immunity, Reciprocity, and Security." See, section 131, Pub. L. No. 101-246.

The Government's position poses a serious statutory construction problem for section 1101(h). Section (h) defines a serious criminal offense as: (1) any felony; (2) "any crime of violence, *as defined in section 16 of Title 18* or (3) any crime of reckless driving or of driving while intoxicated or under the influence of alcohol..." 8 U.S.C. §1101(h). So according to the Government and some lower courts, DUI is a crime under section 16. But if DUI is already a crime of violence under section 16, then it is a serious criminal offense under section (h)(2). But if DUI is already a crime under section (h)(2), then what's the purpose of section (h)(3). The Government's position renders section (h)(3) superfluous and is flatly wrong for this Court must give a construction to the statute that makes all terms relevant and sensible. *United States v. Smith*, 499 U.S. 160, 183 (1991) (citation omitted) ("[a] statute should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant"); *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (explaining that the words of a particular clause of the statute are taken in connection with the whole statute "'and the objects and policy of the law, as indicated by its various provisions, [so as to] give to it such a construction as will carry into execution the will of the Legislature . . . .'"); *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805) ("It is undoubtedly a well established principle in the exposition of statutes, that every part is to be considered, and the intention of the legislature to be extracted from the whole.").

What's more likely? That Congress understood DUI to be a crime of violence under section 16 but nevertheless promulgated section 1101(h)(3) to make extra or doubly sure that DUI was a "serious criminal offense?" Or is it more likely that Congress never understood that DUI was a crime of violence under section 16. It's quite clear that Congress used the term "or" between section (h)(2) and (3). The latter construction makes much more sense in that Congress intended that DUI not be included as section 16 crime. See, *Clay v. United States*, 537 U.S. 522, 529 (2003)("When Congress includes particular language in one section of a statute but omits it in another section of the same Act, [this Court recognizes that] it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

This raises a very problematic issue of Congressional intent. If Congress intended DUI to be an aggravated felony under section 1101(a) – and more particularly section (a)(43)(F) – wouldn't it have done so when it was amending section 1101 to include new section (h) that in fact included DUI as a defined offense.

To point out another potential statutory misconstruction, section (h) specifically defines a serious criminal offense to include a section 16 crime of violence or DUI. So if Congress wanted to include DUI as a crime of violence in section 43(F), then Congress could have easily amended section 43(F) to refer to a serious criminal offense. That is, if section 43(F) referred to a serious criminal offense as defined by section (h), then that would have subsumed both section 16 violent crimes and DUI. An easy and expressed fix, but Congress never did so. Similarly, it could have copied the text of section (h) into section 43(F) too. It did neither.

The legislative history clearly shows that Congress knew about the perils of drunk driving but only provided for stripping drunk diplomats of immunity or barring re-

entry. Nothing in the legislative history of section (h) indicates that Congress even contemplated that DUI could be an offense under section 16 or 43(F). Rather, Congress only showed an interest in handling DUI in relation to diplomats. H.R. 101-17, 101st Cong. 2d. Sess. 98, reprinted in 1990 U.S.C.C.A.N. 56. As mentioned above, that DUI as a crime only appeared in connection with a diplomatic immunity issue is strong indication that Congress did not intend DUI to be imported into section 16.

(iii) Congress continued to amend the immigration laws to add more crimes but still never amended DUI to be a crime of violence or an aggravated felony.

In the same year that Congress enacted section 1101(h), Congress then passed the Immigration Act of 1990 (known as the IMMACT 90) that, aside from stripping certain aliens of discretionary deportation relief, included a term-of-sentence component into the definition of aggravated felony. Pub. L. No. 101-649. Congress did not redefine "aggravated felony" under immigration law or "crime of violence" under federal criminal law to include DUI.

Not to be undone, Congress then passed the Immigration Technical Correction Act of 1994. Pub. L. No. 103-416. This Act expanded the list of aggravated felonies to include less serious, but more common, crimes, such as fraud, burglary, and theft. See, section 222, Pub. L. No. 103-416. Congress did not redefine "aggravated felony" to include DUI even though it was redefining "aggravated felony" to include common crimes. The only legislative history on point is from then-President Clinton stating that the "Act also adds certain crimes to the definition of aggravated felony" and then goes on to discuss other aspects of the Act. Statement By President

William J. Clinton, Upon Signing H.R. 783 (25 Oct. 1994), reprinted in 1994 U.S.C.C.A.N. 3522-1-2.

In 1996, Congress passed the Anti-Terrorism & Effective Death Penalty Act of 1996 (the AEDPA). Pub. L. No. 104-132. Although the AEDPA was a response to the Oklahoma City bombing, it included an immigration law portion that amended section (43) to specifically expand the list of aggravated felonies including sections (43)(J, K, N, P, Q, R, S, O, and T). But yet again Congress did not specifically add DUI to the precise list of aggravated felonies, or amend section 43(F) itself to include DUI as a crime of violence. See also, *United States v. Culbert*, 435 U.S. 371, 378 n. 9 (1978)("We note that when Congress wanted to make racketeering an element of an offense, it knew how to do so.").

Congress then passed the Illegal Immigrant Reform & Immigrant Responsibility Act of 1996 (the IIRAIRA). Pub. L. No. 104-208. The IIRAIRA amended section (43) again. Congress added other aggravated felonies such as sections (43)(A, G, J, M, N, P, R, and S). But this time Congress amended section 43(F) to lower the term of imprisonment for a crime of violence to be an aggravated felony from five years to one. But yet again, Congress amended the very statute in question but failed to expressly include DUI as an aggravated felony. Congress specifically acted to amend the very statute in question but failed to redefine "aggravated felony" to include DUI. Congress did not amend section 16 either. Again, Congress could have simply amended section 43(F) to refer to serious criminal offenses as defined by section (h) because that would have included section 16 crimes of violence and DUI.

Congress never amended the general federal criminal law section 16, Congress amended the Immigration Act many times and added more than forty offenses to the definition of an aggravated felony. Congress added section 1101(h) to specifically enumerate

DUI as a serious criminal offense. So when asking the question of whether the immigration laws include DUI as a deportable offense, it's just common sense that with all the amending Congress did, Congress never intended DUI to qualify as a deportable offense. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385-386- (1992)("A common-sense view of the word 'regulates' would lead to the conclusion that in order to regulate [a matter], a law ... must be specifically directed toward [it]"); also, *TRW v. Andrews*, 534 U.S. 19, 28 (2001)(stating the doctrine of "*expressio unius est exclusio alterius*" that "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.").

It is only judicial activism that has rammed DUI into the definition of a crime of violence so that it qualifies as a deportable offense. This belies the Congressional intent to not do so given the series of amendments Congress enacted. Where Congress amended the precise statute in question to enumerate more felonies yet still failed to add DUI into the statute, this further demonstrates that Congress did not intend to passively include DUI as a deportable offense. See, *Almendarez-Torres*, 523 U.S. at 234 (demonstrating the series of amendments to the Immigration Act that added new crimes and stating that "[t]he history, to our knowledge, contains no language at all that indicates Congress intended to create a new substantive crime."). Even though the inclusion of a crime of violence under section 16 as aggravated felony could be seen as some type of "catch-more" statute designed to sweep up other crimes not specifically enumerated, it is simply unreasonable to conclude that Congress meant to sweep up DUI as an aggravated felony under section 16 in light of the legislative history demonstrating that – despite many opportunities – Congress never designated DUI as a deportable offense.

The *Culbert* case, 435 U.S. 371 (1978), albeit in another context, is particularly instructive. In this case, the defendant was charged with violating the Hobbs Act, 18 U.S.C. §1951 (for bank robbery) and argued that the Government must also show he engaged in racketeering as an element to a Hobbs Act violation. This Court held that nothing in the plain language of the statute required the Government to prove racketeering as a basis for a Hobbs Act violation. The legislative history showed that Congress had enacted a prior racketeering statute, the Anti-Racketeering Act of 1934, 48 Stat. 979. *Culbert*, 435 U.S. at 1114-15. When Congress passed the Hobbs Act, it was well aware of racketeering but "nowhere mentioned racketeering." *Id.* at 1114-15. Continuing to analyze the legislative history, this Court noted that "Congress simply did not intend to make racketeering a separate, unstated element of an Anti-Racketeering Act violation." *Id.* at 376. In construing the legislative history of the Hobbs Act, the Court examined and denounced the argument that racketeering was a predicate to a Hobbs Act violation. Particularly noting that the Hobbs Act came later in time, this Court said, "[i]t is inconceivable that, at the same time Congress was so concerned about clearly defining the acts prohibited under the bill it intended to make proof of racketeering – a term not mentioned in the statute – a separate prerequisite to criminal liability under the Hobbs Act." *Id.* at 378.

Analogizing to *Culbert*, here Congress manifestly said nothing about DUI in any statute or amendment prior to implementing section 1101(h). In promulgating section 1101(h), Congress was only concerned about DUI in relation to diplomats. Congress knew it could have added DUI to section 16 or section (a) but did not do so. In the same regard, Congress' only concern was for diplomatic DUI violations.

(iv) Punishing DUI as a deportable offense is grossly disproportionate and raises Due Process problems.

The Due Process Clause of the Fifth Amendment forbids retroactive legislation when the "retroactive application [of the statute] is so harsh and oppressive as to transgress the constitutional limitation." *United States v. Carlton*, 512 U.S. 26, 30. Retroactive legislation "presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992). Thus, due process "protects the interests in fair notice and repose that may be compromised by retroactive legislation." *Landgraf v. USI Film Prod.*, 511 U.S. 244, 266 (1999). "[R]etrospective laws are, indeed generally unjust; and... neither accord with sound legislation nor with the fundamental principles of the social compact." 2 J. Story, Commentaries on the Constitution § 1398 (5th ed. 1891) (quoted in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 533 (1998)). The constitutionality of retroactive legislation is "conditioned upon a rationality requirement beyond that applied to other legislation." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 223 (1988) (Scalia, J., concurring).

Here, the retroactive defining of DUI to be an aggravated felony would upset settled expectations and throw into uncertainty thousands, if not millions, of cases. DUI offenses are, sadly, among the most common of criminal offenses. If these offenses are aggravated felonies (and have been aggravated felonies since 1996, if not 1990), this would have severe and significant implications for immigration law.

The clearest and most immediate effect of a new definition would be to render thousands of foreign nationals – productive members of society, parents and children and spouses of Americans, who are supporting the country and paying taxes – removable as "aggravated felons." The retroactive application of such a definition would render deportable legal residents who have

established their lives, their families, and their futures in United States. See *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977). See also Jill Fisch, Retroactivity and Legal Change: An Equilibrium Approach, 110 HARV. L. REV. 1055, 1102 (1997) (noting that retroactivity creates the most social cost when it upsets a stable equilibrium because the longer a rule is in effect, and the longer people have had to build their lives around that rule, the more disruptive it will be if the government is permitted to reach back and alter that rule). Where the offense predates 1996, foreign nationals might be eligible to apply for relief under former INA § 212(c), pursuant to this Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), but other long-time residents of this country (particularly those who committed DUI offenses from 1996 onwards) would have no available relief from removal: for such individuals, removal would be automatic.

Such individuals would be forever inadmissible to return legally to this country. The inadmissibility statute, 8 U.S.C. § 1182(h), forbids the issuance of a waiver of criminal grounds of inadmissibility to any former permanent resident who has ever committed an aggravated felony. No matter what hardship is caused to the individual's family members, no matter how many years earlier the crime was committed, such an individual is permanently banished.

A smaller category of affected individuals would include persons who were granted residency status, but who could not have been admitted if DUI offenses were interpreted to be aggravated felonies. Despite final administrative action in such cases, such individuals would be subject to immediate removal, as the Immigration and Nationality Act contains a specific section rendering removable persons who were "inadmissible at time of admission." 8 U.S.C. §1227(a)(1).

While it is true that statutory interpretations are usually retroactive, retroactive application of new interpretations has sometimes been held to be inappropriate. See, e.g., *Warner Jenkinson v. Hilton Davis*, 520 U.S. 17, 28 (1997) (Courts must be cautious about adopting changes that disrupt settled expectations of the [inventing] community), and 520 U.S. at 32 (Ginsburg, J. concurring)("The new presumption, if applied woodenly, might in some instances unfairly discount the expectations of a patentee who had no notice at the time...that such a presumption would apply."). In *Chevron Oil Co. v. Huson*, 404 U.S. 97, 105-109 (1971), the Court set forth three criteria for determining when to apply a decision of statutory interpretation prospectively.

> First, the decision to be applied nonretroactively must establish a new principle of law ***. Second, it has been stressed that we must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Finally, we have weighed the inequity imposed by retroactive application, for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.

Id. (citations omitted). As *Amicus* argues below, retroactive application of this rule would produce unjust and inequitable results, and would trigger grave Due Process concerns.

Five years ago, a majority of this Court struck down as unconstitutional a statute that required

companies formerly in the coal industry to retroactively assume responsibility for coal miners' benefits. *Eastern Enter. v. Apfel*, 524 U.S. 498 (1998). While a plurality of the Court (four justices), resolved the issue on takings grounds, and the Court did not reach the question "whether the Coal Act violates due process in light of the Act's severely retroactive impact," *Eastern Enter.*, 524 U.S. at 537, a majority of the Court focused on the absence of a time limitation on the retroactive reach of the statute. Drawing from due process retroactivity jurisprudence, the plurality opinion noted that the Court's decisions "have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience." Id. at 528-29. Justice Kennedy, concurring in the judgment would have found the Coal Act violative of due process because "in creating liability for events which occurred 35 years ago the Coal Act has a retroactive effect of unprecedented scope." Id. at 549. Justice Kennedy emphasized that the due process right against retroactive legislation reflects the Court's "recognition that retroactive law making is a particular concern for the courts because of the legislative 'temptation to use retroactive legislation as a means of retribution against unpopular groups or individuals.' " Id. (quoting *Landgraf*, 511 U.S. at 266).

In this case, a retroactive ruling that DUI offenses are aggravated felonies, which results in removability from the country and in many cases results in automatic removal, profoundly disrupts the expectations of legal permanent residents who, with the consent of the prosecution, chose to plead guilty to crimes that did not render them deportable. As in *St. Cyr*, such a retroactive interpretation would alter the "quid pro quo between a criminal defendant and the government." *St. Cyr*, 533 U.S. at 321. Many legal aliens pled guilty to such

offenses relying on the then-existing immigration consequences of their conviction. *St. Cyr*, 533 U.S. at 322 (citing *Magana-Pizano v. INS*, 200 F.3d 603, 612 (9th Cir. 1999) ("That an alien charged with a crime . . . would factor the immigration consequences of conviction in deciding whether to plead or proceed to trial is well-documented."). Furthermore, particularly where dealing with misdemeanor offenses such as DUI, these grounds for deportation "reach into parts of the criminal justice system where it has been routine for lawyers and judges to treat cases relatively casually. In a situation where no one expected the stakes to be high, a case may well have been disposed of in minutes." Nancy Morawetz, Rethinking retroactive deportation laws and the Due Process Clause, 73 N.Y.U. L. REV. 97,119 (1998). By so drastically increasing the legal consequences to be bourne by an immigrant who enters a guilty plea, the retroactive interpretation urged by the Government would contravene "elementary considerations of fairness [that] dictate that individuals have an opportunity to know what the law is and conform their conduct accordingly." n18 *Landgraf*, 511 U.S. at 265.

Amicus would urge that the constitutional concerns should be considered as the Court interprets 18 U.S.C. § 16, as the Court traditionally interprets statutes, where possible, to avoid interpretations that raise "grave doubt" about the statute's constitutionality. *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001); *Crowell v. Benson*, 285 U.S. 22, 62 (1932); *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916); see also *United States v. Ubaldo-Figueroa*, 2003 WL 23355650 (9th Cir., 07 Apr. 2004).

E. CONCLUSION

For these reasons, the Congress did not intend to engraft DUI into section 16 as it did not intend that DUI be a crime of violence warranting deportation. The Amicus respectfully request that this Court reverse the judgment of the 11th Circuit, nold that DUI is not a crime of violence under section 16, hold that DUI is not an aggravated felony within the meaning of the section 1101(a), and hence is not a deportable offense.

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